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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

IRA LEE KURNEY,

Defendant and Appellant.

B209074

(Los Angeles County  
Super. Ct. No. VA101704)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Samantha P. Jessner, Judge. Affirmed.

Linn Davis, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Roberta L. Davis  
and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Ira Lee Kurney appeals from the judgment entered following a jury trial that resulted in his convictions for multiple counts of second degree robbery, attempted second degree robbery, and second degree commercial burglary. Kurney was sentenced to 34 years, 4 months in prison. He contends that the trial court erred by admitting evidence of his confession without first conducting a hearing pursuant to Evidence Code section 402 to determine whether his statements were voluntary. Discerning no reversible error, we affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

#### *1. Facts.*

Viewed in accordance with the usual rules governing appellate review (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; *People v. Johnston* (2003) 113 Cal.App.4th 1299, 1303-1304), the evidence established the following.

##### *a. AT Mini Market robbery and burglary.*

Fady Shehatta owned the AT Mini Market located on Artesia Boulevard in the City of Bellflower. On May 4, 2007, at approximately 10:55 a.m., a Black man entered the store and asked to buy a cigar. When Shehatta reached to take the cash, the man grabbed his hand. Shehatta pushed the silent alarm button. Kurney ran into the store, jumped over a Plexiglas wall that shielded the cashier's counter, and opened the door to the cashier's booth. The first robber followed, attempted to knock Shehatta to the floor, and demanded that Shehatta open the safe. A third man, armed with a gun, waited at the front door. The men departed after Shehatta gave them all the cash from the register, in excess of \$10,000.

Shehatta identified Kurney as one of the robbers in a pretrial photographic lineup, at the preliminary hearing, and at trial, but not at a live lineup conducted months after the robbery.<sup>1</sup> Video surveillance tapes of the incident were played for the jury.

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<sup>1</sup> Shehatta identified another suspect at the live lineup as resembling the robber.

*b. David's Electronics robbery and burglary.*

David Nguy and his wife Susana owned David's Electronics, a TV and VCR repair business located on Somerset Boulevard in Bellflower. The store also sold mobile telephones. On July 2, 2007, at approximately 10:20 a.m., three Black men entered the store. One expressed interest in an expensive telephone. The second man suddenly pulled out a gun, jumped over the counter, and hit David in the head, causing David to fall to the ground. The man also pushed Susana to the ground, and ordered both of them to stay down. The men examined the items in the countertop display case. One of the men said there was not enough money in the store, and threatened to rape Susana. David yelled for help. The men ran from the store, taking \$480 in cash, Susana's laptop computer, and approximately \$1,500 in merchandise with them. David called 911.

Kurney's fingerprints were found on the counter. David identified Kurney as one of the robbers in a pretrial photographic lineup and at trial, but did not identify him in a live lineup conducted months after the robbery. Video surveillance tapes of the store, showing the incident, were played for the jury.

*c. Mouw's Market incident.*

Soo An Kim and her husband owned Mouw's Country Store on Woodruff Avenue in Bellflower. The store's cash register was protected by bulletproof glass. On July 3, 2007, at approximately 8:45 a.m., a young Black man entered the store and asked to purchase a cigar. Kim asked for identification because he looked underage. He left the store grumbling. A minute later, a second Black man, wearing a hat, entered the store and asked to buy a cigar. Kim told him he looked too young, and asked for identification. The man then walked to a cooler and selected a soda, which he placed on the counter, along with a \$10 bill. As Kim reached for the money, the man grabbed her arm. The first man reentered the store and climbed over the bulletproof glass. Kim pushed the alarm button, and the men fled.

Kim was unable to identify anyone in either a photographic or a live lineup. A surveillance video of the incident was played for the jury.

d. *VIP Liquor attempted robbery and burglary.*

On July 3, 2007, Adam Lasad was working as a cashier at the VIP Liquor Store located on Del Amo Boulevard in the City of Lakewood. At approximately 9:10 a.m., Kurney and another Black man entered the store. Kurney asked for a cigar. As Lasad put out his hand for Kurney's cash, Kurney grabbed Lasad by his shirt, jumped over the counter, placed a gun to Lasad's head, and demanded money. Lasad pressed the alarm button. Kurney and the other man fled from the store and entered a waiting car. Lasad identified Kurney in a pretrial photographic lineup, and at trial.<sup>2</sup> Lasad also identified Kurney as one of the robbers in the still photographs taken from the store's video surveillance system.

e. *C&R Cleaners robbery and burglary.*

On July 5, 2007, at approximately 11:30 a.m., three Black men armed with semiautomatic firearms entered C&R Cleaners, located on East Compton Boulevard in Compton. One of the men stayed near the front of the store, one went to the middle, and the third went to the back. Among the employees working in the store at the time were Juan Aguilar, Rafael Andres, Salvador Gonzalez, German Morales, and Miriam Franco. The robbers pointed guns at the employees, pushed at least one to the ground, and demanded that all the employees get on the ground and empty their pockets. The men took cash and cellular telephones from four of the employees, and a cellular telephone from the fifth.

None of the employees could identify the robbers, but video surveillance tapes from the store's security system showing the incident were played for the jury.

f. *Kurney's arrest and confession.*

On July 20, 2007, Kurney was arrested by the Long Beach Police Department. He was carrying a loaded handgun, cash, and methamphetamine. On July 24, 2007, Los Angeles County Deputy Sheriff Danny Coon, along with two detectives, interviewed

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<sup>2</sup> Lasad did not attend the live lineup.

Kurney. Kurney was advised of his *Miranda* rights<sup>3</sup> and stated he did not wish to have an attorney present. Kurney admitted committing the July 5, 2007 robbery at C&R Cleaners. He stated he used a B-B gun, and did not want anyone to be hurt. He needed the money to pay his rent and to buy food for his daughter and his girlfriend. Kurney also admitted committing the robberies at David's Electronics, VIP Liquor, and Mouw's Market. He denied using a gun at Mouw's Market, and admitted using the firearm found in his possession at David's Electronics and the VIP Liquor Store. Kurney was "regretful [and] sad" and stated he had not intended to hurt anyone.

## 2. *Procedure.*

Trial was by jury. Kurney was convicted of eight counts of second degree robbery (Pen. Code, § 211),<sup>4</sup> one count of attempted second degree robbery, and four counts of second degree commercial burglary (§ 459). The jury found Kurney personally used a firearm during commission of the attempted robbery and six of the completed robberies (§§ 12022.5, subd. (a), 12022.53, subd. (b)), and that a principal was armed during commission of one of the burglaries and one of the robberies. The jury deadlocked, and a mistrial was declared, on counts 6 and 7, the charges related to the Mouw's Market incident. The trial court sentenced Kurney to a term of 34 years, 4 months. It imposed a restitution fine, a suspended parole restitution fine, and multiple court security fees. Kurney appeals.

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<sup>3</sup> *Miranda v. Arizona* (1966) 384 U.S. 436.

<sup>4</sup> All further undesignated statutory references are to the Penal Code.

## DISCUSSION

*The trial court's failure to conduct an Evidence Code section 402 hearing to determine whether Kurney's confession was voluntary was harmless error.*

a. *Additional facts.*

(i) *Defense motion to exclude and request for hearing.*

During the People's case-in-chief, after the testimony of the victims had been presented, the prosecutor informed the court and defense counsel that she intended to introduce evidence of Kurney's confession to officers. According to the prosecutor, Kurney had been in custody on an unrelated "Long Beach case" when he was questioned. After being informed of his *Miranda* rights, he had admitted four of the five robberies. The prosecutor explained she had been undecided, up until that point, whether she would introduce the evidence or not.

Defense counsel objected that the evidence should have been disclosed sooner, and complained that the defense was being "sandbagged." The prosecutor countered that she had provided the evidence to the defense as soon as she had it, months previously. Defense counsel conceded he had been in possession of the information since January 2008, approximately six months before trial.

Defense counsel pointed out that at the time Kurney was interviewed by officers, Kurney had already been charged, and had an attorney appointed, in the unrelated Long Beach case. The attorney was not present during the interview. Defense counsel argued: "[I]t appears to me that these statements were taken in violation of *M[a]ssiah*.<sup>[5]</sup> That is, he had counsel. Counsel was never contacted to determine whether or not it would be appropriate for them to interview him. They went to the courthouse and interviewed him at the courthouse out of the presence of counsel and obtained what they call a waiver. [¶] I read the alleged waiver form. It doesn't say, having these rights in mind I agree to

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<sup>5</sup> *Massiah v. United States* (1964) 377 U.S. 201.

“speak to you without any attorneys present.” Defense counsel had “assumed based on that, that should [the confession] be offered in evidence we would be able to have a hearing and solve all of that problem.”

The trial court reasoned that the defense had been in possession of the evidence for months and had had ample time to move to suppress, or could have “brought . . . the subject up when we were talking about [Evidence Code section] 402 issues,” regardless of whether the People had confirmed their intent to introduce the evidence. Defense counsel countered that he made the motion as soon as he had been advised that the People intended to use the statements. He expressly asked the trial court to conduct a hearing before admitting the evidence. Failing that, counsel requested that the court find he had provided ineffective assistance by not moving to suppress earlier and declare a mistrial.

The trial court denied the mistrial motion, declined to find counsel was ineffective, and ruled the request for a suppression hearing was untimely. It found the confession was admissible.

(ii) *Motion for a new trial.*

After the jury’s verdict, Kurney moved for a new trial on the ground that the trial court had erred by failing to conduct a voluntariness hearing before admitting evidence of his confession. According to Kurney, because the officers who interviewed him knew he was represented by counsel in another matter, they violated *Miranda* and *Massiah* by failing to obtain that attorney’s consent before interviewing him about the instant crimes. Kurney averred that the “crimes charged in the Long Beach case were in the same general time frame and were believed to be part of a spree by the same group of young male African Americans. The only apparent reason for the two separate cases was that the incidents occurred in the geographical jurisdictions of two different Los Angeles County Superior Court [b]ranches.” Defense counsel also argued, at the hearing on the new trial motion, that Kurney had not given an “express, explicit, knowing, intelligent waiver” of his *Miranda* rights, and was never asked whether he would speak to police without counsel present.

The trial court denied the new trial motion. It concluded there was no *Massiah* violation, given that Kurney was “questioned with regard to uncharged and unrelated offenses.” It further found the evidence Kurney committed the crimes was overwhelming, including, inter alia, the witness identifications and surveillance videotapes and photographs shown to the jury. Accordingly, there was no violation of Kurney’s Sixth Amendment right to counsel.

b. *Discussion.*

(i) *The trial court erred by refusing to conduct an Evidence Code section 402 hearing regarding the voluntariness of Kurney’s confession.*

Kurney complains that the trial court prejudicially erred by refusing to conduct a hearing on the voluntariness of his confession before admitting the evidence. We agree the trial court erred, but conclude the error was harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24).

“A defendant who has confessed to the commission of a crime has a ‘constitutional right at some stage in the proceedings to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession.’ (*Jackson v. Denno* (1964) 378 U.S. 368, 376-377.) Such a defendant ‘is entitled to a determination of the voluntariness of his confession in the state courts in accordance with valid state procedures . . . .’ [Citation.] Due process ‘requires “that a jury [not] hear a confession unless and until the trial judge [or some other independent decision maker] has determined that it was freely and voluntarily given.” [Citations.]’ (*Crane v. Kentucky* (1986) 476 U.S. 683, 687-688.)” (*People v. Smithson* (2000) 79 Cal.App.4th 480, 493-494.) California law is in accord. A timely *Miranda* objection imposes on the trial court “ ‘a procedural duty to determine the existence or nonexistence of the preliminary fact, i.e., appellant’s waiver of his *Miranda* rights, out of the presence of the jury. [Citations.] That a defendant is entitled to a voir dire hearing on the *Miranda* question before his extrajudicial statements are admitted into evidence is beyond question. [Citations.] And while the trial court need not make formal findings, its



determination on the *Miranda* question must be reflected in the record with “unmistakable clarity.” [Citations.]’ ” (*People v. Smithson, supra*, at p. 494; Evid. Code, § 402, subd. (b) [in a criminal action, “the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury if any party so requests”].)

Contrary to the trial court’s conclusion, Kurney’s motion was not untimely. A defendant may raise the validity of his or her confession at a variety of points when the prosecution seeks to introduce such evidence, i.e., at the preliminary or other pretrial hearing; pursuant to a section 995 motion to set aside the information; via a motion in limine; or “*following an objection raised during trial.*” (*People v. Smithson, supra*, 79 Cal.App.4th at p. 494, italics added.) That principal is especially relevant here, where the People did not seek to offer the evidence until near the end of trial. At that point, Kurney timely objected and immediately requested a hearing.

(ii) *The trial court’s error was harmless beyond a reasonable doubt.*

Although the trial court erred in refusing to conduct an Evidence Code section 402 hearing, we conclude the error was harmless beyond a reasonable doubt. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310-312 [admission of an involuntary confession is trial error subject to harmless error analysis].)

Kurney’s primary contention below was that the July 2007 police interview at which he confessed violated the principles articulated in *Massiah v. United States, supra*, 377 U.S. 201. In *Massiah*, the high court held that “ ‘once a judicial proceeding has been initiated against an accused and the Sixth Amendment right to counsel has attached, any statement the government deliberately elicits from the accused in the absence of counsel is inadmissible at trial against the defendant.’ ” (*People v. Thornton* (2007) 41 Cal.4th 391, 433-434; *Massiah v. United States, supra*, at pp. 205-207; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 66-67.) “The *Massiah* right, however, is offense-specific; that is, it applies only to ‘ ‘offenses as to which adversary judicial criminal proceedings have been initiated’ ” [citation], such proceedings including ‘ ‘ formal charge, preliminary hearing, indictment, information, or arraignment,’ ” ’ ” and to those offenses

alone. (*People v. Thornton, supra*, 41 Cal.4th at pp. 433-434; *McNeil v. Wisconsin* (1991) 501 U.S. 171, 175; *People v. Slayton* (2001) 26 Cal.4th 1076, 1079.) The Sixth Amendment right to counsel does not extend to uncharged offenses even if they are “ ‘inextricably intertwined’ factually” with charged offenses. (*Texas v. Cobb* (2001) 532 U.S. 162, 164, 174; *People v. Slayton, supra*, at pp. 1079-1080.) Accordingly, “ ‘[e]ven after an accused has counsel with regard to a particular charged offense, he or she may be questioned by police following *Miranda* advisements with respect to any uncharged offense. [Citation.] Incriminating statements pertaining to those uncharged offenses, as to which the Sixth Amendment right has not yet attached, are admissible at a subsequent trial of those offenses. [Citations.]’ [Citation.]” (*People v. Slayton, supra*, at p. 1079, fn. omitted.)

Here, it is undisputed that at the time Kurney made his confession, he had not been charged with any crimes stemming from the incidents at the AT Mini Market, David’s Electronics, the VIP Liquor Store, C&R Cleaners, or Mouw’s Market. Accordingly, as a matter of law, his *Massiah* claim necessarily lacked merit. (See, e.g., *Texas v. Cobb, supra*, 532 U.S. at p. 174; *People v. Thornton, supra*, 41 Cal.4th at pp. 433-434.) The trial court’s failure to conduct a hearing on this aspect of Kurney’s claim was therefore harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. 18.)

Kurney also contended, albeit cursorily, that any waiver of his *Miranda* rights was defective. The People’s only response to Kurney’s contention on appeal is the surprising statement that “[t]he trial court did not need a hearing to ascertain that appellant properly waived his right to an attorney before he spoke with the officers.” To the contrary, as we have discussed, such a hearing *was* required. A custodial interrogation must be preceded by *Miranda* warnings and by the suspect’s waiver of the rights embodied in those warnings. (*Miranda v. Arizona, supra*, 384 U.S. at pp. 478-479.) A suspect in custody must therefore be warned he or she has the right to remain silent and to have an attorney present and any statement may be used against him or her. A waiver of these rights must be knowing, intelligent and voluntary, and generally cannot be presumed from a silent record. (*People v. Combs* (2004) 34 Cal.4th 821, 845; *People v. Lilliock* (1965) 62

Cal.2d 618, 622.) “A confession is involuntary if it is ‘not “ ‘the product of a rational intellect and a free will’ ” ’ [citation], such that the defendant’s ‘will was overborne at the time he confessed.’ [Citation.] . . . Whether a statement is voluntary depends upon the totality of the circumstances surrounding the interrogation.” (*People v. Smith* (2007) 40 Cal.4th 483, 501; *People v. Neal* (2003) 31 Cal.4th 63, 79.) Therefore, to determine whether Kurney’s confession was voluntary, the trial court should have determined whether the proper *Miranda* advisements were provided, and whether Kurney knowingly, intelligently, and voluntarily waived them.

In determining whether the trial court’s error was harmless, we do not speculate as to how the court would have ruled had an Evidence Code section 402 hearing actually been held. (See *In re Juma P.* (1988) 204 Cal.App.3d 1228, 1237.) Instead, we assume for purposes of argument that the confession was improperly admitted. Because overwhelming evidence was presented apart from the confession, admission of Kurney’s statements was harmless beyond a reasonable doubt. (See *People v. Davis* (2009) 46 Cal.4th 539, 599; *Chapman v. California, supra*, 386 U.S. at p. 24.)

As our Supreme Court has explained, the erroneous admission of an involuntary confession “properly might be found harmless, for example, (1) when the defendant was apprehended by the police in the course of committing the crime, (2) when there are numerous, disinterested reliable eyewitnesses to the crime whose testimony is confirmed by a wealth of uncontroverted physical evidence, or (3) in a case in which the prosecution introduced, in addition to the confession, a videotape of the commission of the crime [citation].” (*People v. Cahill* (1993) 5 Cal.4th 478, 505.) Here, the confession, while undoubtedly persuasive to the jury, was not the “centerpiece” of the prosecution’s case. (See *People v. Cahill, supra*, at p. 505.) The evidence that the crimes occurred was strong and undisputed. The evidence that Kurney was one of the robbers was likewise strong and undisputed. Surveillance videos of the robberies as they occurred at the

AT Mini Market, David's Electronics, and C&R Cleaners were played for the jury. Photographs extracted from surveillance camera at the VIP Liquor Store were also provided to the jury. Moreover, Shehatta, David Nguy, and Lasad all identified Kurney in pretrial photographic lineups and at trial. Lasad also identified Kurney as one of the individuals in the surveillance photographs. Seven of Kurney's fingerprints were lifted from the display counter at David's Electronics. Kurney did not confess to the AT Mini Market crimes, demonstrating the jury found him guilty of those offenses based on the strength of the other evidence presented.<sup>6</sup> Based on the overwhelming nature of the People's case apart from the confession, we necessarily conclude the jury would have rendered the same verdicts even had the confession been excluded. (See, e.g., *People v. Davis*, *supra*, 46 Cal.4th at pp. 599-600; *People v. Cunningham* (2001) 25 Cal.4th 926, 994.)

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<sup>6</sup> Conversely, the jury deadlocked on the crimes related to the incident at Mouw's Market, and the charges were dismissed, despite the fact that Kurney confessed to committing the Mouw's Market robbery.

**DISPOSITION**

The judgment is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.